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KS. DISTRICT COURT
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2013 FEB 27 P 3:45

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION SIX

JOHN DOE,

Plaintiff,

v.

KIRK THOMPSON, DIRECTOR OF THE KANSAS BUREAU OF INVESTIGATION, and FRANK DENNING, JOHNSON COUNTY, KANSAS SHERIFF,

Defendants.

Case No. 12-C-168

MEMORANDUM DECISION AND ORDER

This matter comes before the Court on the Defendants' Motion to Strike. After careful consideration, the Court finds and concludes as follows:

NATURE OF THE CASE

This dispute arises from the 2011 Amendments to the Kansas Offender Registration Act (KORA), which may increase the Plaintiff's offender registration requirement from 10 years to 25 years. On February 19, 2003, the Plaintiff pled guilty to indecent liberties with a child/touching in Johnson County, Kansas, in violation of K.S.A. 21-3503(a)(1). At the time of his conviction, the Plaintiff was obligated to register with the Kansas Bureau of Investigation (KBI) as a sex offender for 10 years—until 2013.

In 2011, the Kansas Legislature amended the KORA. Under the 2011 amendments, a person convicted of indecent liberties with a child would have to register with the KBI for 25 years. See K.S.A. 22-4906(b)(1)(E) (stating that "if convicted of any of the following offenses,

an offender's duration of registration shall be . . . if not confined, 25 years from the date of conviction: . . . indecent liberties with a child"). The KBI subsequently informed the Plaintiff that the 2011 amendments apply retroactively and that he must register until 2028.

On February 15, 2012, the Plaintiff filed a Petition for Declaratory Judgment, requesting that this Court declare that Defendants KBI Director Kirk Thompson and Johnson County Sheriff Frank Johnson cannot enforce the 25-year registration period. The Plaintiff argues that the registration period is either punitive and contrary to Kansas law and the Ex Post Facto Clause or not to be applied retroactively. The Court granted the Plaintiff leave to file his Petition under a pseudonym, John Doe, to protect his privacy.

On November 9, 2012, both the Defendants and Plaintiff filed Motions for Summary Judgment. The Plaintiff and his wife, Jane Doe, also filed affidavits explaining the impact the Plaintiff's registration as an offender has had on them and their children. The Does made statements indicating that the registry is available to the public and that registering negatively affects the Plaintiff's wife and children, work, time, ability to obtain housing, emotional well-being, home, access to his children's school, and access to the hospital,. On December 7, 2012, the Defendants filed a Joint Motion to Strike declarations from Doe and his wife's affidavits as well as text from the Plaintiff's Memorandum in Support of Summary Judgment. The Defendants argue that the statements violate several evidentiary rules.

DISCUSSION AND CONCLUSIONS OF LAW

The Defendants argue that the Court should strike statements in John and Jane Doe's affidavits because they are hearsay, inadmissible opinion testimony, or are not based on personal knowledge. They further assert that in the Plaintiff's Memorandum in Support of Summary Judgment, he impermissibly relied on these inadmissible statements as well as social science

studies and websites that were not properly admitted into evidence. The Court does not find that any of the Defendants' objections provide reason to strike material from the Does' affidavits. Thus, the Plaintiff did not impermissibly rely on any affidavit declarations in his Memorandum. Moreover, the Court finds that the social science research and websites are admissible at the summary judgment stage. Therefore, the Court denies the Defendants' Motion to Strike.

I. The affidavits satisfy the personal knowledge requirement because there is circumstantial evidence supporting the Does' declarations.

Under K.S.A. 60-256(e), supporting affidavits "must be made on personal knowledge, set out facts that would be admissible in evidence and show that the affiant or declarant is competent to testify on the matters stated." As a result, conclusory affidavits are insufficient to establish contested facts for summary judgment purposes. See *RAMA Operating Co., Inc. v. Barker*, 47 Kan. App. 2d 1020, 1031-32, 286 P.3d 1138 (2012). Here the Defendants argue that many of the Does' statements are conclusory. For example, the Defendants contend that the following testimony by the Plaintiff is improper:

> "[m]y children have come home from school crying because children at school told them their father is a "bad man," "pervert," or "pedophile." My children's schoolmates are repeating what they hear from their own parents, people who know nothing about me except what they can view on the Offender Registry."

The Defendants argue that the Plaintiff does not offer personal knowledge about the source or extent of other parents' knowledge about the Plaintiff and his registration status.

Yet, affidavits satisfy the personal knowledge requirement if the affiant used circumstantial evidence to deduce the facts to which the affiant attested. See *Aeroflex Wichita, Inc. v. Filardo*, 294 Kan. 258, 278-79, 275 P.3d 869 (2012) (finding that an affiant had personal knowledge of facts and circumstances after "looking to the circumstances surrounding" an alleged misappropriation of trade secrets and noting that prior to the alleged misappropriation,

the competitor had been unable to produce a working prototype, unable to complete a technical evaluation, and unable to achieve certification with the technology).

Here the Plaintiff has circumstantial evidence of the facts to which he attested. It is unlikely that he could obtain direct evidence of other parents' use of the registry, and he has provided that the offender registry exists and is available to the public. The Plaintiff has also stated that his children complain to him about negative interactions with their peers based on his registration status. These statements are circumstantial evidence that support his inference that other parents are using the registry and informing their children to stay away from him and his children. Thus, K.S.A. 60-256(e) is satisfied. A similar analysis applies to the other declarations identified by the Defendants; therefore, the Court will not strike the Does' statements based on a lack of personal knowledge.

II. The declarations in the affidavits are not offered to prove the truth of the matter asserted.

The Defendants also argue that the Does offer numerous, inadmissible hearsay statements in their affidavits. For example, the Defendants contend that the Plaintiff's declaration that his children's peers have called him a "bad man," "pervert," and "pedophile," is hearsay. Under K.S.A. 60-460, evidence of a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated, is inadmissible hearsay evidence. Statements do not constitute hearsay if offered merely to "show that the statements were said or to show their effect on the listener." *State v. Becker*, 290 Kan. 842, 847, 235 P.3d 424 (2010) (internal quotation marks omitted).

Here the Plaintiff did not offer the statements to prove the truth of the matter stated. He is certainly not trying to prove that he is a bad man, pervert, or pedophile. Instead, he offered the statements to demonstrate their negative effects on his children. Thus, they do not constitute

hearsay. A similar analysis applies to the Plaintiff's other testimony regarding his former job, former lease, property value, ability to volunteer at his children's school, ability to visit the hospital, and community perception. Because the Court has a duty to see that the full truth is developed by the evidence and the statements were not offered to prove the truth of the matter stated, the Court will not strike any testimony as hearsay. See *State v. Thomas*, 252 Kan. 564, 570, 847 P.2d 1219 (1993).

III. The opinion testimony in the affidavits is admissible.

The Defendants also argue that the Does improperly offer legal opinions and conclusions in their affidavits. The Defendants note that in the Plaintiff's affidavit, he repeatedly equates offender registration with "punishment" and "shaming." The Defendants classify these statements as legal conclusions because whether offender registration constitutes punishment is the ultimate issue in this case.

Under K.S.A. 60-256(e), a Plaintiff can only make statements that would be admissible in evidence, and the Court has discretion in determining the admissibility of opinion statements. See *Schmeck v. City of Shawnee*, 232 Kan. 11, 31, 651 P.2d 585 (1982) (stating that "[w]hether a witness is qualified to testify as to his opinion is to be determined by the trial court in the exercise of its discretion"). The Court must determine whether the Plaintiff's opinion (a) may be rationally based on his perception and (b) is helpful to a clearer understanding of his statements. See K.S.A. 60-456(a). The Court may allow lay witness opinions that "embrace ultimate issues." *Smith v. United Technologies, Essex Group, Inc., Wire and Cable Div.*, 240 Kan. 562, 565-66, 731 P.2d 871 (upholding a trial court's admission of lay witness opinion testimony that specific actions by managerial personnel constituted racial discrimination against

people who filed civil rights complaints), *overruled on other grounds by Coleman v. Safeway Stores, Inc.*, 242 Kan. 804, 752 P.2d 645 (1988); *Schmeck*, 232 Kan. at 31.

The Court finds that the statements in dispute are both rationally based on the Plaintiff's perception and helpful for the Court's understanding of his statements. The Plaintiff's use of "punishment" and "shaming" are rationally based on his perception because the Plaintiff notes that he believes he has lost out on community, social, and employment opportunities as a result of his registration status. It logically follows that he would consider registering punishment. Moreover, the Plaintiff's statements are helpful to the Court because they provide a clear picture of the Plaintiff's experience as a registrant. Thus, the Plaintiff's statements are admissible as opinion testimony. A similar analysis applies to the other contested statements in the Plaintiff's and his wife's affidavits. Therefore, the Court does not strike any testimony as inadmissible legal opinion testimony.

IV. The Plaintiff's social science research studies are admissible as legislative facts.

The Defendants argue that the Plaintiff should have presented social science research studies regarding offender registration via an expert witness, rather than citing to the studies in his Memorandum. The Defendants further contend that the Court cannot take judicial notice of the studies because they do not establish facts that are beyond reasonable dispute. The Plaintiff, however, contends that the studies are admissible as legislative facts. The Eighth Circuit has defined legislative facts in reference to adjudicative facts:

> "When a court finds facts concerning the immediate parties who did what, where, when, how, and with what motive or intent the court is performing an adjudicative function, and the facts are conveniently called adjudicative facts. Stated in other terms, the adjudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go to the jury in a jury case. They relate to the parties, their activities, their properties, their businesses. Legislative facts, on the other hand, do not relate specifically to the activities or characteristics of the litigants. A court generally

Courts may take notice of legislative facts and then use social science research to make law. See *United States v. Coffman*, 638 F.2d 192, 194-95 (10th Cir. 1980) (stating that the federal rule of evidence regarding judicial notice does not apply to legislative facts); McCormick on Evidence § 331, at 447 (6th ed. 2006) (stating that the federal rules make no effort to regulate judicial notice of legislative, social science facts); Robert J. Fowks & William F. Harvey, *Vernon's Kansas Statutes Annotated Code of Civil Procedure*, Vol. 4, at 208-09 (1965) (stating that trial judges regularly take judicial notice of facts which are disputable and found in treatises and articles and that the Kansas rules on judicial notice do not discuss legislative facts); Steve Leben & Megan Moriarty, *A Kansas Approach to Custodial Parent Move-Away Cases*, 37 WASHBURN L.J. 497, 530-31 (1998) (noting that the Kansas rule of evidence regarding judicial notice, K.S.A. 60-409, appears not to apply to legislative facts).

Scholars have analogized a court's use of legislative facts to its use of legal authority, calling legislative facts "social authority" which are used to establish general rules that have application beyond the case at issue. See Steve Leben & Megan Moriarty, *A Kansas Approach to Custodial Parent Move-Away Cases*, 37 WASHBURN L.J. at 526; Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 516-17 (1986). Courts have considered social authority when deciding policy-laden cases involving race discrimination, gender discrimination, single-sex education, the death penalty, jury size, and violent video games. Monahan & Walker, *Twenty-Five Years of Social Science in Law*, 35 LAW & HUM. BEHAV. at 76.

Here the social science studies cited in the Plaintiff's Memorandum in Support of Summary Judgment are legislative facts because they do not relate specifically to the Plaintiff but generally inform the court of a policy issue—the effects that offender registries have on

registrants. Because the studies constitute legislative facts, the Court may take judicial notice of them without determining whether they are indisputably accurate. The Court may wish to take judicial notice of the studies in the future; therefore, it does not grant the Defendants' Motion to Strike the studies.

V. The websites are admissible as background information.

The Defendants finally argue that the affidavits and Memorandum violate K.S.A. 60-256(e), the best evidence rule, and Supreme Court Rule 141(a) because they improperly reference websites that directly provide the public with access to registry information or describe cell phone applications that provide the public with registry information. The Court finds that these statutes do not require the Court to strike material from the affidavits and Memorandum because the Court may wish to use the websites as background information.

Courts may consider websites as background information when ruling on summary judgment. See *Kyllo v. United States,* 533 U.S. 27, 35-36 n.3, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001) (citing internet sources for upcoming National Law Enforcement and Corrections Technology Center projects as background for the Court's holding). Here the Court reserves its right to use the websites as background information when ruling on the parties' summary judgment motions.

The Court also notes that the websites are likely still admissible if not only used for background information. First, K.S.A. 60-256(e) is not applicable because while the statute requires that affiants attach certified copies of any papers cited in their affidavits, a website is not a paper, and thus, is not governed by the statute.

In addition, the Defendants' argument that the websites violate the best evidence rule is essentially an argument that the websites must be authenticated under K.S.A. 60-464, which

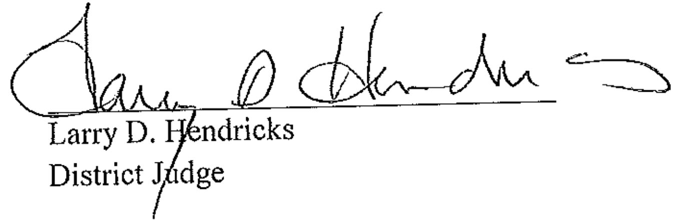
states that "[a]uthentication of a writing is required before it may be received in evidence. Authentication may be by evidence sufficient to sustain a finding of its authenticity or by any other means provided by law." In what is widely regarded as the watershed opinion on the admissibility of electronically transmitted information, United States District Court for the District of Maryland found that "any serious consideration of the requirement to authenticate electronic evidence needs to acknowledge that, given the wide diversity of such evidence, there is no single approach to authentication that will work in all instances." *Lorraine v. Markel American Insurance Co.*, 241 F.R.D. 534, 553-554 (D. Md. 2007). Rather, as with the authentication of any evidence, "the best or most appropriate method for authenticating electronic evidence will often depend upon the nature of the evidence and the circumstances of the particular case." *Tienda v. State*, 358 S.W.3d 633, 638-39 (2012).

The Court finds that the Plaintiff has adequately authenticated the websites under the circumstances at hand. The plaintiff has provided printed copies of the websites and indicated that he has personal knowledge that they provide access to registry information, such as the offender's crime of conviction and current address. See *U.S. v. Tank*, 200 F.3d 627, 630 (9th Cir. 2000); *Osborn v. Butler*, 712 F. Supp. 2d 1134, 1146 (D. Idaho, 2010); *Kassouf v. White*, No. 75446, 2000 WL 235770 (Ohio Ct. App. Mar. 2, 2000). The Court also notes that the Defendants do not dispute that the websites provide access to registry information and that there is no other practical way for the Plaintiff to authenticate the websites. Therefore, the Court will not strike the websites from the affidavit or the Plaintiff's Memorandum.

CONCLUSION

After careful review, this Court DENIES the Defendants' Motion to Strike. This Memorandum Decision and Order shall constitute the Court's entry of judgment when filed with the Clerk of this Court. No further journal entry is required.

Dated this 21st day of February, 2013.



Larry D. Hendricks
District Judge

CERTIFICATE OF MAILING

I hereby certify that a copy of the above and foregoing **MEMORANDUM DECISION AND ORDER** was mailed, hand delivered, or placed in pick-up bin this 27th day of February, 2013, to the following:

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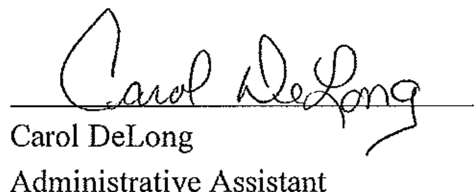

Carol DeLong
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